NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JEFFERY GLENN DAILEY, formerly doing business as AJ's Bargain World, also known as D&D Ranch, Debtor.	BAP No. WO-09-011
JANICE D. LOYD, Trustee, Plaintiff – Counter-Defendant – Appellee, v. LUVERNE BALL, Defendant – Counter-Claimant – Appellant.	Bankr. No. 07-12794 Adv. No. 08-01010 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CORNISH, Chief Judge, RASURE, and KARLIN, Bankruptcy Judges.[1]

CORNISH, Chief Judge.

Creditor Luverne Ball ("Creditor") appeals the bankruptcy court's order granting summary judgment in favor of trustee Janice D. Loyd ("Trustee")

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

1 The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

avoiding a mortgage lien on real property pursuant to 11 U.S.C. § 544.[2] Having reviewed the record and applicable law, we REVERSE.

I. BACKGROUND FACTS

This appeal involves non-homestead real property located in Seminole County, Oklahoma (the "Property"). On March 10, 2005, the previous owners of the Property entered into a contract of sale with Dailey Investments, LLC, agreeing to sell the Property for $100,000.[3] Debtor Jeffery Glenn Dailey ("Debtor") executed the contract of sale on behalf of Dailey Investments, LLC, as manager of the LLC.

On April 4, 2005, the previous owners executed a warranty deed conveying the Property to Dailey Investments, LLC.[4] On the same day, again acting as manager of Dailey Investments, LLC, Debtor executed a real estate mortgage covering the Property in favor of Creditor, Luverne Ball.[5] The mortgage was given to secure repayment of a promissory note in the amount of $100,000.[6] Creditor paid $100,000 to the previous owners for the Property.

Both the warranty deed and the mortgage were recorded in the Seminole County Clerk's office on April 13, 2005. However, no articles of organization had been or ever were filed with the Oklahoma Secretary of State for Dailey Investments, LLC. Debtor testified that he had an attorney and intended to file

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[2] Unless otherwise indicated, all future statutory references are to the Bankruptcy Code, Title 11 of the United States Code.

[3] *Contract of Sale*, *in* Appellant's App. at 71.

[4] *Warranty Deed*, *in* Appellant's App. at 21.

[5] *Real Estate Mortgage*, *in* Appellant's App. at 22.

[6] *Fixed Rate Note*, *in* Appellant's App. at 79-80. The note appears to be executed by Debtor in his individual capacity.

the required documents to form the LLC, but that he never got around to filing.[7]

Two and a half years later, on August 6, 2007, Debtor filed his Chapter 7 bankruptcy petition and schedules. On Schedule A, Debtor scheduled the Property as owned by himself and his father, Arnold Dailey, as joint tenants.[8] On Schedule D, Debtor scheduled Creditor's mortgage on the Property dated April 4, 2005, in the amount of $100,000.[9] Additionally, during a Rule 2004 examination, Debtor testified that the Property was owned by Jeff and Arnold Dailey.[10] However, the record on appeal contains no evidence of their joint ownership, and the parties agree that Debtor never had record title.

Trustee filed this adversary proceeding pursuant to § 544(a), alleging that as of the date of bankruptcy, Creditor's mortgage upon any interest of the Debtor in the Property was unperfected and should be avoided.[11] Creditor answered and counterclaimed, asking the bankruptcy court to declare that he had a first and prior lien, and to reform the deed and mortgage based on mutual mistake.[12] Creditor asserted that it was the parties' mutual mistake that caused the Property

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[7] *Transcript of 341 Hearing Conducted September 19, [2007]*, at 16-17, *in* Appellant's App. at 44-45; *Transcript of Rule 2004 Examination of Jeffrey [sic] Glenn Dailey taken on October 5, 2007, at 138, in* Appellant's App. at 50. A limited liability company is formed when articles of organization are filed with the Oklahoma Secretary of State. *See* Oklahoma Limited Liability Company Act, Okla. Stat. Ann. tit. 18, § 2004 (West 2009).

[8] *Schedule A, in* Appellant's App. at 52.

[9] *Schedule D, in* Appellant's App. at 8.

[10] *Transcript of Rule 2004 Examination of Jeffrey [sic] Glenn Dailey taken on October 5, 2007, at 138, in* Appellant's App. at 50. Debtor testified that the "original owner came back and resigned a warranty deed to Jeff and Arnold Dailey, I believe, rather than Dailey Investments."

[11] *Complaint to Avoid Lien* at 3, ¶ 9, *in* Appellant's App. at 12.

[12] *Answer and Cross-Petition, in* Appellant's App. at 19.

to be deeded to Dailey Investments, LLC, rather than to Debtor as an individual.[13]

Trustee filed her motion for summary judgment and brief in support, asserting she was entitled to avoid the lien as a matter of law.[14] Creditor responded, claiming whether Debtor had any interest in the Property was an issue of material fact in dispute, and therefore summary judgment was not proper.[15] The bankruptcy court determined that the relevant facts were undisputed, and granted summary judgment in favor of Trustee, avoiding Creditor's mortgage lien.[16] Creditor filed a motion to reconsider, which the bankruptcy court denied by order dated March 16, 2009. Creditor timely appealed.

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. Neither party elected to have this appeal heard by the United States District Court for the Western District of Oklahoma. The parties have therefore consented to appellate review by this Court.[17]

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[18] Here, the bankruptcy court's summary judgment avoiding Creditor's mortgage leaves

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[13] *Id.* at ¶ 16, *in* Appellant's App. at 18.

[14] *Plaintiff's Motion for Summary Judgment*, *in* Appellant's App. at 27.

[15] *Response of Defendant Luverne Ball to Plaintiff's Motion for Summary Judgment* at 3, *in* Appellant's App. at 59.

[16] *Memorandum of Decision and Order Granting Trustee's Motion for Summary Judgment*, *in* Appellant's App. at 96.

[17] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

[18] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

nothing further for the lower court's consideration. Thus, the order of the bankruptcy court is final for purposes of review.[19]

III. STANDARD OF REVIEW

A ruling on summary judgment is reviewed *de novo*, applying the same legal standard used by the bankruptcy court.[20] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[21] "In reviewing a summary judgment motion, the court is to view the record 'in the light most favorable to the nonmoving party.'"[22]

IV. ANALYSIS

The bankruptcy court granted Trustee summary judgment avoiding Creditor's mortgage pursuant to § 544(a)(3). The bankruptcy court explained its decision as follows:

> [T]he Court agrees with the Trustee that Dailey Investments was effectively a non-existent entity. Thus, it was incapable of taking title to the real property and was incapable of granting the [Creditor] a mortgage on the real property.
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> Because the mortgage from Dailey Investments to the [Creditor] was out of the chain of title, the Trustee, with her statutory position as a bona fide purchaser, would not have constructive notice of the [Creditor's] mortgage.[23]

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[19] *Geygan v. World Savs. Bank, FSB (In re Nolan)*, 383 B.R. 391, 393 (6th Cir. BAP 2008) ("An order granting a trustee's motion for summary judgment resulting in the avoidance of a mortgage lien is a final order.").

[20] *Kojima v. Grandote Int'l Ltd. Liab. Co. (In re Grandote Country Club Co., Ltd.*), 252 F.3d 1146, 1149 (10th Cir. 2001).

[21] Fed. R. Civ. P. 56(c).

[22] *Grandote*, 252 F.3d at 1149 (quoting *Thournir v. Meyer*, 909 F.2d 408, 409 (10th Cir. 1990)).

[23] *Memorandum of Decision and Order Granting Trustee's Motion for Summary Judgment* at 4, *in* Appellant's App. at 99.

We disagree.[24] For the reasons discussed below, we conclude Trustee would be charged with constructive notice of Creditor's properly filed mortgage, and therefore, cannot avoid it under § 544(a)(3).

A bankruptcy trustee is granted the "strong arm" powers of a hypothetical bona fide purchaser under § 544(a)(3). That section provides as follows:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by–
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> . . . .
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> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.[25]

This provision grants a trustee the status of a bona fide purchaser as of the time of bankruptcy filing, with the power to avoid liens that a bona fide purchaser could avoid. However, that power is subject to the applicable state's constructive notice law.[26]

In deciding this appeal, we are guided by the Tenth Circuit's recent analysis regarding a trustee's avoidance powers and another state's constructive notice laws in *In re Colon*, which was issued after the bankruptcy court's decision herein.[27] The Tenth Circuit concluded that a trustee could not avoid a mortgage

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[24] As authority, the bankruptcy court cited and discussed *Alpine Bank v. Moreno (In re Moreno)* 293 B.R. 777 (Bankr. D. Colo. 2003). In *Moreno*, a debtor executed a deed of trust in her capacity as manager of an incorporated business with respect to property she owned in her individual capacity. Accordingly, the facts in *Moreno* are not analogous to the appealed case, and we do not find it particularly instructive.

[25] 11 U.S.C. § 544(a)(3).

[26] *Watkins v. Watkins*, 922 F.2d 1513, 1514 (10th Cir. 1991).

[27] *Hamilton v. Wash. Mut. Bank FA (In re Colon)*, 563 F.3d 1171 (10th Cir. (continued...)

containing an erroneous legal description because he was charged with constructive notice of the mortgage under state law, and was required to inquire further when an inconsistency was discovered in a preliminary search of the land records. In applying Kansas constructive notice laws, the Tenth Circuit focused on the state's procedures for recording conveyances of real property and its system for indexing and tracking those conveyances.[28]

Under Oklahoma law, a purchaser of land takes the property with constructive notice of whatever appears in the conveyances constituting his chain of title.[29] A "chain of title" consists of "the chain of recorded conveyances made to the successive holders of the record title and those made by them while respectively the holders thereof."[30] Oklahoma's constructive notice statute provides that "[e]very conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors."[31] The office of

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[27] (...continued)
2009).

[28] *See id.* at 1179-1180, 1183.

[29] *Watkins*, 922 F.2d at 1513.

[30] *In re Colon*, 563 F.3d at 1179 (citing A. James Casner et al., *American Law of Property*, Vol. IV, § 17.17 at 591 (1952)).

[31] Okla. Stat. Ann. tit. 16, § 16 (West 2009). *See also* Okla. Stat. Ann. tit. 19, § 298(E) (West 2009), which provides:

> All documents accepted for filing, including all documents filed before the effective date of this act, shall be deemed to comply with the requirements of this section and, except as otherwise provided by law, impart constructive notice of the contents of such document to third parties unless a person claiming adversely to any such document files an affidavit setting forth the basis of such claim in the office of the county clerk of the county where the property is located within six (6) months from the effective date of this act. *Id.* (footnotes omitted).

each county clerk is required to keep an alphabetical index of deeds and mortgages, both direct and inverted, *i.e.*, the grantor and grantee indices.[32] Additionally, the office of the county clerk is required to keep a numerical index, in which are noted all deeds relating to tracts of land and units within unit ownership estates within the limits of such county.[33] This index is usually referred to as a "tract index."

The standard method of title searching is to examine the chain of title using the grantor and grantee indices as follows:

> A chain-of-title search for a property confirms (or disproves) the right of the purported owner to transfer an interest in the property. The searcher first constructs a chain of grantors of the property, using the grantee index to find the deed to the purported owner from a prior grantor, returning to the grantee index to find the deed to that prior grantor from an earlier grantor, and continuing that process for an appropriate period of time. The searcher then uses the grantor index to find all conveyances by each grantor during the period of the grantor's ownership of the property and examines each conveyance to determine whether the property conveyed is the property of interest.[34]

In the case on appeal, it is undisputed that if a hypothetical purchaser had checked the Seminole County grantor index for any interest in the Property granted by Debtor, Jeffery Glenn Dailey, the mortgage executed by Dailey Investments, LLC would not be found. But, as explained above, prior to searching for interests in the Property ***granted by Debtor***, a hypothetical purchaser should first check "the grantee index to find the deed to the purported owner from a prior grantor," *i.e.*, for interests in the Property ***granted to Debtor***. Doing so would have revealed that ***Debtor did not in fact have record title to the Property***. Discovery of this fact alone would provide notice that further investigation was needed, and would lead a hypothetical purchaser to search the tract index. There, the deed to Dailey

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[32] Okla. Stat. Ann. tit. 19, § 287 (West 2009).

[33] Okla. Stat. Ann. tit. 19, § 291 (West 2009).

[34] *In re Colon*, 563 F.3d at 1179.

Investments, LLC and the mortgage to Creditor would be found.

The doctrine of constructive notice is based on the theory that one who neglects a duty to search a title record should be charged with notice of facts that would have been discovered upon a proper search.[35] Here, a hypothetical purchaser of the Property "would be on constructive notice that [Creditor's] mortgage created a lien on that property or, at the least, a purchaser would be on constructive notice of facts that would require a reasonably prudent person to investigate and then determine that [Creditor's] mortgage burdened the property."[36] This is particularly true under the facts of this case where an initial search would reveal no interest of the Debtor in the Property. A reasonably prudent purchaser would have notice that further investigation was needed to verify Debtor's claim of ownership. Further investigation would soon reveal the Creditor's mortgage. As a result, Trustee cannot avoid Creditor's mortgage pursuant to § 544(a)(3).

We recognize that the mortgage Creditor holds was made by Dailey Investments, LLC, an entity never properly organized under the laws of Oklahoma. However, the deed and mortgage were properly recorded in the land records of Seminole County over two years before the Debtor filed bankruptcy. On their face, they would appear to a hypothetical purchaser to be legitimate transactions. At the very least, Trustee, as a hypothetical purchaser searching land records, would be put on notice that Debtor may not own the property he claimed to own, and that the Property had been mortgaged. This is not a case where a creditor failed to record its mortgage, thus there was no notice of any kind in the land records, no matter how diligent a search was made. Additionally, this is not a typical case where a debtor is trying to hide an asset from the trustee.

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35 *Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1388 (10th Cir. 1980).

36 *In re Colon*, 563 F.3d at 1186.

Instead, we view the validity or enforceability of Creditor's mortgage, and the Trustee's constructive notice of the mortgage, as separate and distinct issues. In *In re Johnston*,[37] the trustee filed an adversary complaint to avoid a mortgage made individually by a married debtor. The mortgage was duly recorded in the county land records.[38] The trustee alleged the mortgage was not "valid," because at the time it was executed, the property was owned by debtor and his soon-to-be ex-wife as tenants by the entirety, and the property was never conveyed to the debtor individually subsequent to the divorce.[39] On the basis of this "invalidity," the trustee argued she could avoid the mortgage under § 544(a)(3). The bankruptcy court was not persuaded:

> We conclude for reasons set forth in this memorandum opinion that the mortgage presently is not enforceable. The trustee does not, however, qualify as bona fide purchaser and therefore may not avoid the mortgage on that basis in accordance with § 544(a)(3).[40]

Because the trustee had constructive notice of the mortgage, the bankruptcy court ruled that she did not qualify as a hypothetical bona fide purchaser for purposes of § 544(a)(3):

> As a result of [ ] recording, any subsequent purchaser of the property would, at the very least, have constructive notice of the mortgage presently held by [creditor]. Said bona fide purchaser would at the very least have a duty to inquire and if inquiry is made, said bona fide purchaser would learn of the blemish on the title.[41]

The alleged "defects" of the mortgages involved in *Johnston* and in this appeal are of the same character: they are not patent on the face of the instrument, nor

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37 *Swope v. Wash. Mut. Home Loans, Inc. (In re Johnston)*, 333 B.R. 724 (Bankr. W.D. Pa. 2005).

38 *Id.* at 733.

39 *Id.* at 729.

40 *Id.* at 728.

41 *Id.* at 733.

are they discoverable by diligently searching the appropriate land title records.[42] Accordingly, we are not convinced that this type of defect can defeat Trustee's constructive notice of the mortgage. Here, as in *Johnston*,

> The trustee has cited to no authority for the proposition that, as a hypothetical bona fide purchaser, she can avoid a duly recorded mortgage on the theory that the public record does not indicate that the mortgagor who granted the mortgage in the first place was not in a position to do so.
>
> Should there be a legal theory according to which the trustee can avoid a duly recorded mortgage against property of the bankruptcy estate because the mortgagor was not in a position to grant the mortgage, we are not prepared to sally forth on our own and articulate that theory on behalf of the trustee.[43]

V. CONCLUSION

The bankruptcy court's order granting Trustee's motion for summary judgment and setting aside Creditor's mortgage lien is REVERSED.

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[42] We note that Oklahoma's Title Examination Standards regarding limited liability companies allow a title examiner to rely upon an instrument containing a proper acknowledgment that a person who executes an instrument as a manager on behalf of the limited liability company does in fact hold that position, that the manager is authorized to act on behalf of the company, and that property acquired by the company may be conveyed by the company. Okla. Stat. Ann. tit. 16, Ch. 1, § 14.2 - 14.4 (West 2009).

[43] *In re Johnston* at 733-34 (emphasis omitted).